

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Hearing Officer Notice Soliciting Comments on
Whether the Department Should Open an
investigation to Establish an Instate Universal
Service Fund

DTE 03-45

**REPLY COMMENTS OF AT&T COMMUNICATIONS OF
NEW ENGLAND, INC.**

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Introduction

AT&T Communications of New England, Inc. (“AT&T”) respectfully submits these reply comments pursuant to the Department of Telecommunications and Energy (“Department”) notice soliciting comments in the above captioned proceeding, issued May 29, 2003, (“*Notice*”). Pursuant to the *Notice*, the Department sought comment in response to a March 5, 2003, Petition (“Petition”) from Richmond Connections d/b/a Richmond Networx (“Richmond Networx”) requesting that the Department institute a proceeding to investigate the establishment of a Universal Service Fund (“USF”) for the Commonwealth. Specifically, the Department requested interested parties to file comments regarding: (1) whether the Department has sufficient statutory authority under existing federal and state statutes to establish a USF for the Commonwealth; and, if so, (2) whether the Department should initiate an investigation into the establishment of a USF for the Commonwealth.¹

In response to the Notice, AT&T filed comments on June 20, 2003, (“AT&T Comments”). In addition, the following parties filed comments in this proceeding: PAETEC Communications, Inc. (“PAETEC”), Richmond Connections Inc., d/b/a Richmond Networx (“Richmond Networx”), Richmond Telephone Company (“Richmond Telephone”), Sprint Communications Company, L.P. (“Sprint”), Verizon Wireless (“Verizon Wireless”), and Verizon Massachusetts (“Verizon”).

The conclusion reached by Sprint,² Verizon,³ and Verizon Wireless⁴ that the Department lacks the authority to establish an in-state USF is incorrect as a matter of law. As set forth in the

¹ *Notice*, at 2.

² See D.T.E. 03-45, *Comments of Sprint Communications Company, L.P.*, June 18, 2003 (“*Sprint Comments*”).

³ See D.T.E. 03-45, *Comments of Verizon Massachusetts*, June 20, 2003 (“*Verizon Comments*”).

AT&T Comments, the Department has broad authority under Massachusetts law to establish a USF under its substantial ratemaking power. Indeed, the Department has been exercising that authority for decades to establish rates that were explicitly designed to recover revenues that the incumbent local exchange carrier claimed it needed to fund lower residential exchange rates for universal service purposes. The Department's authority to establish a USF is further verified in the comments of Richmond Telephone,⁵ Richmond Networx,⁶ and PAETEC Communications.⁷

In addition, initiating an investigation into the establishment of a USF and universal service charge is the next natural step in the Department's historic effort to establish policies that are consistent with the development of competition through access reform, while – at the same time – promoting the Department's long-standing ratemaking objective of universal service. While Verizon would like to see perpetual subsidies continue through inflated access charges, as articulated by several commenting parties, now is the appropriate time to consider the establishment of a definitive USF.

(continued...)

⁴ See D.T.E. 03-45, *Initial Comments of Verizon Wireless*, June 19, 2003 (“*Verizon Wireless Comments*”).

⁵ See D.T.E. 03-45, *Comments of Richmond Telephone Company*, June 20, 2003 (“*Richmond Telephone Comments*”).

⁶ See D.T.E. 03-45, *Comments of Richmond Connections Inc. d/b/a Richmond Networx*, June 20, 2003 (“*Richmond Networx Comments*”).

⁷ See D.T.E. 03-45, *Comments of Paetec Communications, Inc.*, June 19, 2003 (“*Paetec Comments*”).

Argument

I. VERIZON’S CLAIM THAT THE DEPARTMENT LACKS THE AUTHORITY TO ESTABLISH A USF IS DISINGENUOUS, GIVEN THAT VERIZON HAS SOUGHT AND OBTAINED A UNIVERSAL SERVICE CHARGE AS PART OF ITS ACCESS RATES FOR YEARS.

In its comments, Verizon argues that the Department lacks the legal authority under Massachusetts law to enact an in-state USF.⁸ Verizon’s position is disingenuous, given that it has been more than willing to enjoy the benefits of the Department’s broad authority allowing Verizon to impose a universal service charge in its access rates and to collect the resulting subsidies for universal service for decades. Apparently, Verizon believes that the Department has authority to establish rates to advance universal service only when Verizon receives the revenues generated by those rates. Verizon is wrong. The Legislature did not, of course, grant to the Department the authority to establish rates that raise revenues to fund universal service objectives only when the revenues are provided to Verizon.

As set forth in the *AT&T Comments*, the Department has been granted expansive authority to regulate telecommunications carriers and services in the Commonwealth pursuant to its enabling statute.⁹ More specifically, the Department has express authority to establish rates for the purpose of recovering the cost of telecommunications services. Verizon does not dispute this point. In fact, Verizon concedes that the Department has well-established ratemaking authority.¹⁰ Nothing in that grant of authority restricts the Department’s ability to set a rate that recovers a portion of the cost of local exchange service simply because the rate is labeled a USF

⁸ *Verizon Comments*, at 3-6.

⁹ *AT&T Comments*, at 4.

¹⁰ *Verizon Comments*, at 4.

charge.¹¹ As Richmond networks aptly points out “[h]aving determined, albeit indirectly, that the present scheme of Verizon’s implicit subsidization of rural residential services is a just and reasonable practice, the department cannot be said to lack to requisite authority to investigate the creation of a more rational system required in the competitive era.”¹²

As AT&T set forth at some length in its *Comments*, the history of the Department’s ratemaking has included for decades the very specific goal of universal service.¹³ More significantly, in order to achieve this result, the Department – with the express intent of subsidizing residential rates – set the rates of other services above cost.¹⁴ In short, the setting of rates required to fund universal service requirements has been a well-established part of the Department’s ratemaking authority for decades.

It is ironic, indeed, that Verizon, which has been the historically subsidized beneficiary of the Department’s prior ratemaking authority, now claims the Department lacks such authority. Certainly Verizon did not dispute the Department’s authority to set rates above cost in D.P.U. 93-125, when the express intent was to subsidize *Verizon’s* residential rates.¹⁵ In fact, the establishment of a USF, in conjunction with access reform, is precisely what the Department has been regulating for nearly two decades. Apparently, only when the Department seeks to establish a universal service charge that will produce revenues available to other carriers does Verizon believe that the Department lacks authority.

¹¹ *AT&T Comments*, at 4.

¹² *Richmond Networx Comments*, at 8.

¹³ *Id.*, at 8 (citing D.P.U. 89-300 (1990)).

¹⁴ *Id.*, at 8. (citing D.P.U. 93-125 (1994)).

¹⁵ *See* D.P.U. 93-125 (1994), at 4.

Indeed, as recently as its alternative regulation proposal in D.T.E. 01-31, Verizon unabashedly proposed that the Department exercise its authority to establish rates that Verizon claims are necessary to fund universal service requirements. The only difference between Verizon's proposal in D.T.E. 01-31 and that contemplated by the Department in this docket is the name of the rate. In its alternative regulation proposal, Verizon proposed that it would maintain its low residential rates only if the Department continued to allow it to include in its switched access rates a substantial margin above cost.¹⁶ In other words, Verizon proposed that its access charge contain a significant "universal service" component so that it could maintain lower basic residential exchange rates.¹⁷ In short, according to Verizon, a universal service charge is lawful if Verizon is entitled to call it an access charge and receive the revenues without having to account for their use.

Universal service has been a criterion for setting "just and reasonable" rates for decades. Surely, the Legislature did not intend to grant the Department the power to set "just and reasonable rates" only when the source of the revenues necessary to achieve universal service objectives is called an "access charge" and only when the recipient of the revenues is the incumbent. That which the Department has been doing for decades, it has the power to continue to do even though the name of the rate that ratepayers will pay is different- especially when the revenues generated by the charge will be visible and subject to public accountability. The

¹⁶ See D.T.E. 01-31 *Phase I Order*, at 18-20, May 8, 2002.

¹⁷ Indeed, Verizon's Alternative Regulation proposal, which contemplated the use of revenues generated by one service (access) in order to avoid raising prices on another service (residential local exchange) might well be illegal under Verizon Wireless' clearly preposterous statement of the law:

"There are no statutes that authorize the DTE or any other Commonwealth agency to require contributions of any kind from carriers or their customers to subsidize other carriers, services or customers." Verizon Wireless Comments, at 3.

Department should reject Verizon's duplicitous argument that the Department does not have the authority to establish a universal service charge, an argument that is motivated by nothing more than an anticompetitive attempt to maintain its privileged position as the only recipient of universal service revenues.

II. NONE OF THE PARTIES ARGUING THAT THE DEPARTMENT DOES NOT HAVE THE AUTHORITY TO ESTABLISH A USF CHALLENGES THE DEPARTMENT'S WELL ESTABLISHED RATEMAKING AUTHORITY.

Even the comments filed by Verizon, Verizon Wireless, and Sprint, while opining that the Department did not have the authority to establish a USF, nonetheless confirmed the Department's substantial ratemaking authority. In fact, Verizon agrees that "the [D]epartment has broad statutory authority to regulate telecommunications services and rates under its general ratemaking authority."¹⁸ Sprint additionally supported this position, noting that the Department "also has a statutory duty to ensure that all charges demanded or received by any common carrier for any service rendered or performed are just and reasonable."¹⁹

Verizon Wireless states that the term 'universal service' does not specifically appear in "any telecommunications statutes that the DTE administers," as purported support for its position that the Department lacks authority to establish a USF. Apparently, Verizon Wireless argues that the Department may not use universal service objectives as a criterion for establishing a rate simply because the term "universal service" is not mentioned in the statutes. Such an argument is clearly fallacious on its face. If Verizon Wireless' argument were correct, the Department would not be able to set rates based on "cost of service" or based on "rate of return" simply because those terms do not appear explicitly in the statute. In any event, as further explained in

¹⁸ *Verizon Comments*, at 4.

¹⁹ *Sprint Comments*, at 2.

the *AT&T Comments* and herein, the Department's ratemaking decisions have included the setting of rates so as to "ensure rates that allow basic telecommunications services to be obtained by the vast majority of the state's population."²⁰ The argument of Verizon Wireless, if correct, would invalidate the entire fabric upon which two decades of Departmental ratemaking has been based.²¹

Moreover, the arguments by Verizon,²² Verizon Wireless,²³ and Sprint²⁴ based on other jurisdictions whose administrative agencies did not have authority to establish a USF is irrelevant to this proceeding. The fact that administrative agencies in other jurisdictions may or may not have been given differing degrees of discretion by that jurisdiction's respective legislature is irrelevant to the Department's analysis in this regard. This is clearly the case given that the Department's authority comes from its enabling statutes²⁵ - not by analogy to the powers granted to administrative agencies in other jurisdictions. Indeed, in Michigan, to which Verizon and its cohorts point, the Michigan Commission concedes that under the Michigan Telecommunications Act, the Commission is not granted "any plenary ratemaking power."²⁶

²⁰ *Id.*, (citing D.P.U. 89-300)

²¹ One of the most baseless "concerns" that Verizon Wireless raises is the "problem" of how the Department would find the power to implement the safeguards necessary to prevent abuses. *Verizon Wireless Comments*, at 5. Apparently, Verizon Wireless believes that the Department may establish rates for the furtherance of universal service, as it has done for decades through access charges, and delegate to Verizon the right to police itself against the abuse of discretion in the use of such funds, but may not police the use of such funds itself.

²² *Verizon Comments*, at 5-6.

²³ *Verizon Wireless*, at 5-6.

²⁴ *Sprint Comments*, at 3.

²⁵ *See AT&T Comments*, at 5.

²⁶ 1999 WL 113074 (Mich. P.S.C.), at 4.

Thus the only legal authority that is germane to the Department's inquiry in this proceeding is that which is controlling in Massachusetts.

III. NONE OF VERIZON'S ARGUMENTS OPPOSING A USF PROVIDE A REASON NOT TO INVESTIGATE WHETHER A USF IS APPROPRIATE.

Verizon makes a number of unsupported assertions and arguments purportedly to show that "An Instate USF Is Not Necessary to Provide Affordable Telecommunications Services at Reasonably Comparable Rates in Massachusetts."²⁷ Verizon's argument, however, does not address the question asked by the Department. The Department asked whether an investigation would be appropriate. Rather than addressing whether an investigation would be appropriate, however, Verizon simply asserts its view of what the result of such an investigation would be. Indeed, Verizon's untested assertion that a USF is not necessary to provide affordable service demonstrates the necessity of conducting an investigation to determine whether its conjecture is correct. Verizon's argument, in fact, provides one of the factual issues that must be considered in determining whether a USF is required in Massachusetts and, as result, affirmatively demonstrates the need for an investigation in order to reach an informed decision.

In any event, Verizon's claim that "there is no price squeeze between Verizon MA's wholesale rates in Western Massachusetts and its retail rates"²⁸ is patently false. Verizon's statewide average rate for basic residential local exchange service in a local calling area is approximately \$16.00, while its wholesale loop rate in Zone 4 areas for would-be competitors is over \$23.00.²⁹ When a competitor must pay more for one element needed to offer service than

²⁷ *Verizon Comments*, at 6.

²⁸ *Verizon Comments*, at 7.

²⁹ See D.T.E 01-20, *Proposed Revised Compliance filing Verizon Massachusetts*, June 9, 2003.

the retail rate for the service, it is highly unlikely that there will ever be competition in such areas. Clearly, if end-users are ever going to have a choice in local service providers, a portable subsidy that is available to any carrier seeking to offer service in those areas must be made available.

Moreover, Verizon's argument that the Department need not worry about a price squeeze in rural areas because competitors can compete using resale is hardly reassuring. Full implementation of the 1996 Telecommunications Act requires that all three modes of entry be available: not only resale, but also facilities-based and UNE-based competition. Furthermore, there are compelling policy reasons for vigorously implementing the 1996 Act in this regard. Although Verizon would like nothing better than to force all of its competitors to purchase its services for resale, such a result would provide little choice for end-users. Resellers may resell only the exact service that Verizon offers. For end-users who want different services and bundles of services, UNE based and facilities based competitors must find it economically rational to compete. The only way to accomplish that result in high cost areas, while at the same time maintaining residential prices at a level consistent with universal service goals, is to establish a system of explicit and portable subsidies.

The Department has long recognized the difficulty of introducing competition when a system of implicit subsidies to only one carrier, the incumbent, is used to advance universal service objectives. Now that the retail rates for the incumbent have been established and the wholesale rates that competitors must pay are about to be finalized, it is appropriate to investigate whether, and how, to establish a system of explicit universal service funding based on a visible universal service rate approved by the Department for that purpose. In such an investigation, it will be open to Verizon to argue that a visible and portable subsidy mechanism

is not necessary. But – after years of the Department’s recognition of the problems of the present system – it is hard to accept without investigation Verizon’s unsupported claims.

IV. A STATE USF WOULD FINALLY ESTABLISH A CLEAR FUND AS OPPOSED TO AN AMALGAMATED SUBSIDY, AND SHOULD APPLY TO WIRELESS AS WELL AS WIRELINE CARRIERS.

Verizon and Verizon Wireless both argue against an in-state USF, essentially on grounds that such a fund would not benefit consumers. Specifically, Verizon argues that it would be “unreasonable and disruptive” for the Department to “tamper” with its recent rate orders including that in D.T.E. 01-31.³⁰ As AT&T explained in its *Comments*, the Department specifically deferred consideration of the USF and access reform issues in D.T.E. 01-31, raising the prospect that the matters would soon be considered.³¹ Verizon’s argument holds little merit given that the Department essentially preserved the consideration of the matter until an opportunity such as that currently presented to the Department in this proceeding.

Verizon Wireless argues that “by taxing all consumers of telecommunications service, the program would actually increase the price of service, making service less affordable to consumers across Massachusetts.”³² But this point, while attempting to demonstrate against the establishment of a USF, actually proves the point for a USF. By establishing a USF in conjunction with access reform, there will be parity in the charges assessed for telecommunication services.

³⁰ *Verizon Comments*, at 6.

³¹ *AT&T Comments*, at 12.

³² *Verizon Wireless Comments*, at 6.

Lastly, Verizon Wireless argues that should the Department in fact establish a USF, wireless carriers should be exempt.³³ In fact, it states that “[u]niversal service should not be misused to subsidize one set of competitors at the expense of another.” This is precisely the reason that the Department should establish a USF, and the reason it should be technologically neutral. Only after the Department established a technologically neutral USF, in conjunction with the reduction of access charges to cost will there exist a fee that is equitably applied to all telecommunications customers. The subsidies that may have been appropriate twenty years ago are no longer relevant. From the perspective of the consumer, the technologies for the delivery of local service (e.g. wireless, wireline, VOIP) are one and the same. As pointed out by Richmond Telephone, “[t]he cannibalization of this access (and the support inherent therein) by wireless providers was not envisioned when these rates were developed.”³⁴ Accordingly the Department must ensure that no particular technology receive the *de facto* economic benefits of subsidization, or conversely, relief from USF fees, at the expense of other technologies.

Conclusion

For the reasons set forth above and in AT&T’s initial comments, the Department has the authority to implement a competitively neutral method of achieving universal service through the establishment of a universal service fund and charge and should move forward immediately to do so in this docket.

³³ *Id.*, at 6-7.

³⁴ *Richmond Telephone Comments*, at 5.

Respectfully submitted,

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